Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1337

CALVIN D. RAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

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UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT
PETITION FOR WRIT OF CERTIORARI TO THE

To: Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Calvin D. Rahn, hereby petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Judicial Circuit which affirmed the Judgment of the United States District Court, District of Colorado, convicting the Petitioner of knowingly and feloniously embezzling and converting to his own use property of the United States in violation of 18 U.S.C. §§ 641 and 2.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals has not yet been assigned a Federal Report of Citation. A copy of the opinion is appended to this Petition (Appendix A). The Court's order denying Petitioner's Motion for a Rehearing is appended hereto (Appendix B).

JURISDICTION

The order sought to be reviewed was made and entered on the 28th day of February, 1975. An order denying a timely motion for rehearing was made and entered on March 25, 1975. The statutory provisions which confer jurisdiction on this Court to review the Judgment in question by Writ of Certiorari is 28 U.S.C. § 1245(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether information of criminal activity occurring more than twenty (20) months prior to the issuance of a search warrant is too remote in time to establish probable cause at the time of the issuance of the warrant.

2. Whether the statement and weapons taken from Petitioner subsequent to the search of his residence constituted the fruits of the unlawful search of his residence.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

(All references to the record below will be Volume number followed by page number).

On July 10, 1973, Inspector Jackie V. Neal of the Alcohol, Tobacco and Fire Arms Bureau submitted an Affidavit for a Search Warrant to United States Magistrate Royce D. Sickler requesting a Warrant to search Petitioner's residence for a Browning over/under 12 gauge shotgun and other weapons of unknown description. (Vol. VI, Page 4). The complete facts alleged in the Affidavit to establish the grounds for the issuance of the Search Warrant were as follows:

> On September 13, 1969, eighty-four weapons, seventy-six hand guns and eight long guns, were seized from Robert L. Nelson at Arapahoe County in Colorado. Those same weapons were forfeited to the United States on June 30, 1971 in case number C-2273 in the District Court for the District of Colorado.
>
> Thereafter, nineteen of the above-described weapons were ordered transferred to Washington, D.C. by James L. Welch, Chief Special Investigator for Alcohol, Tobacco and Firearms Division, hereinafter referred to as ATF, and those weapons were shipped to Washington, D.C. on October 6, 1971. On September 29, 1971, Chief Special Investigator Welch ordered the destruction of sixty-four weapons from the above seizure, and as a part of that order, each weapon to be destroyed was listed and identified. Among the weapon subject to the destruction order were:
>
> 1. One Springfield .45 caliber automatic, serial number 406849.
> 2. One Colt .45 caliber automatic, serial number 589436.

3. One Colt .45 caliber automatic,
   serial number 560293.
4. One Luger .44 caliber carbine,
   serial number 111042.
5. One Colt .45 caliber automatic,
   serial number 90040.
6. One Colt .45 caliber automatic,
   serial number 125553.
7. One Springfield .45 caliber automatic,
   serial number 74345.
8. One Steyr-Daimler-Puch A.G. .22 caliber rifle,
   serial number 568.
9. One Browning over/under 12 gauge shotgun,
   serial number 35445.

On October 12, 1971, Area Supervisor Karl E. Terlau and Special Investigator Calvin D. Rahn, both of ATF, certified on Treasury Form 3367, that they had destroyed the above nine weapons, together with the other fifty-five weapons, at the Comco Foundry, 6770 Brighton Blvd., in Denver by melting the weapons. The weapons described above numbered one through eight were subsequently pawned by Area Supervisor Karl E. Terlau at the Lakewood Pawnbrokers, Inc. at 5300 W. Colfax Avenue in Lakewood, Colorado.

Special Agent Carl Newton of the ATF told the affiant that from about April, 1971 through September, 1971, he had on various occasions seen and personally inspected a Browning over/under 12 gauge shotgun in a distinctive tan suede case which was in the evidence vault at the ATF office in Denver. Agent Newton stated that to the best of

his knowledge, the above-described weapon was the only one of this type in that vault at that time. During the fall of 1971, Agent Newton accompanied Special Agent Calvin D. Rahn on a duck hunting trip to the Dillon, Colorado area, and at that time Special Agent Rahn was using a Browning over/under 12 gauge shotgun which appeared to Agent Newton to be identical in all respects to the one he had seen in the ATF vault. At that time Agent Newton also observed Agent Rahn remove that shotgun from a tan suede case, which appeared to Agent Newton to be the same case he had seen in the ATF vault. Agent Newton had noticed a small soiled spot on the gun case when first seen by him in the vault, and he said he noticed the same spot on the case in Agent Rahn's possession.

Karl E. Terlau was interviewed by the affiant on July 9, 1973, regarding the fact that the above-described weapons had not all been destroyed. During the interview Terlau stated that he and Agent Rahn had agreed to take an equal number of weapons from the previously described sixty-four, and to destroy the rest. Terlau said that he could not remember which weapons Agent Rahn took, but that Agent Rahn commented at that time that several of the weapons were too nice to destroy, and would be worth much more money if kept for several years. Terlau claimed that he sold all the weapons that he took to Lakewood Pawnbrokers. It is therefore believed that if there was an equal split as Terlau said, then Agent Rahn got about eight weapons also.

The affiant has investigated two pawnbrokers in Lakewood, and the Denver Police pawn shop records, and has not been able to find record of any

> weapons sales by Agent Rahn. The above-described premises is the present residence of Special Agent Calvin D. Rahn according to his employment record at ATF. Because the affiant cannot find any records of weapons sales by Agent Rahn, and because of Rahn's statement to Terlau regarding the potential for increase in value of some of the weapons, it is believed that Agent Rahn is still in possession of the above-described Browning shotgun and other weapons of unknown description.

On July 13, 1973, ATF inspector John R. Armel executed a search of the Rahn residence and discovered six (6) weapons and a written list of firearms under the bed in the master bedroom. (Vol. I, Page 168). These items were subsequently admitted into evidence at trial as Plaintiff's Exhibits 18, 19, 20, 21, 22, 23 and 24. (Vol. I, Page 178).

Following the search, Billy L. Gaunt, Regional Director of the Bureau of ATF, made a long distance telephone call to Rahn in Minnesota and ordered him to return to Denver to be interviewed by the Inspection Service. (Vol. II, Page 111, and Vol. IV, Page 25, 26). At that time, Gaunt instructed Rahn that an ATF agent from the Minneapolis-St. Paul office would meet him at the airport in order to make arrangements for his transportation back to Denver. (Vol. IV, Page 25). The evidence at trial was in dispute as to whether or not Gaunt also advised Rahn that his home had been searched. (Compare Vol. II, Page 111 and Vol. III, Page 34-35 with Vol. IV, Page 25).

On the morning of July 14, 1973, ATF agent James A. Duff, pursuant to the directions of Inspectors Neal and Armel, met Rahn at Stapleton International Airport. (Official Transcript Motions, Page 83; Vol. II, Page 37). Upon meeting Rahn at the airport, Duff conversed with him but at no time did he advise Rahn of his Miranda rights. (Official

Transcript Motions, Page 84). In the course of their conversation, Duff informed Rahn that his home had been searched and that certain weapons had been found there. (Official Transcript Motions, Page 85). Duff helped Rahn retrieve his lugagge, which included a suitcase and two rifle cases, and in so doing, engaged in further discussions concerning the contents of the luggage. (Official Transcript Motions, Page 85, Page 96; Vol. II. Page 38). During the twenty minute drive from the airport to the ATF office downtown, Duff and Rahn conversed further and Duff questioned Rahn relative to the search of his home. (Official Transcript Motions, Page 97). Upon arriving at the ATF office, Duff helped Rahn carry the suitcase and two (2) rifle cases into Duff's office. (Official Transcript Motions, Page 87; Vol. II, Page 40). At the ATF office, Rahn and Duff met and conversed with Inspector Armel and Special Agents William Rehling and Kenneth Presley. (Vol. II, Page 6). Shortly thereafter, Rahn's suitcase, which contained five (5) handguns, was opened in Duff's office. (Vol. II, Page 40). After the luggage had been opened, Rahn went into another office with Inspector Armel and Special Agent Rehling. (Vol. II, Page 40-41). At that time, Armel advised Rahn of his rights, (Vol. II, Page 12; Vol. VI, Page 75), and proceeded to conduct a ninety (90) minute interview. (Vol. II, Page 6). The tape recording of that interview and its subsequent twenty (20) page written transcription were admitted at trial as Plaintiff's Exhibits 33 and 33-4. (Vol. II, Page 21; Vol. VI, Pages 74-75). During a break in the interview, Inspector Armel helped Rahn carry the two (2) rifle cases and those firearms which had been in Rahn's luggage into the office where the interview was conducted. (Vol. II, Page 14; Vol. VI, Page 81). Once the interview resumed, Rahn identified each of the weapons and turned them over to Armel. (Vol. VI, Page 81). These weapons were subsequently received at trial as Plaintiff's Exhibits 26, 27, 28, 29, 30, 31 and 32. (Vol. II, Page 21).

On August 23, 1973, the Federal Grand Jury for the District of Colorado handed down a two-count indictment charging Rahn with violations of 18 U.S.C. 641 and 1001. (Vol. VI, Page 1).

On October 31, 1973, Rahn filed a Motion to Suppress evidence which had been seized from his home pursuant to a Search Warrant, and also to suppress a confession made by him subsequent to the search of his residence. (Vol. VI, Page 7). Oral argument on the Motion to Suppress was heard and denied by Chief Judge Alfred A. Arraj on November 2, 1973. (Official Transcript Motions, Page 82, Page 106). Thereafter, on February 8, 1974, Chief Judge Arraj entered an Order disqualifying himself as the trial judge and the case was transferred to another division within the district. On March 20, 1974, Petitioner renewed his Motion to Suppress and filed a Memorandum Brief in support of that Motion. (Vol. VI, Page 9). That same day, Judge Fred M. Winner entered a written Order denying the Motion to Suppress. (Vol. VI, Page 24).

Trial to a jury commenced on March 27, 1974, and a verdict of not guilty as to count one and guilty as to count two was returned on April 2, 1974. (Vol. V, Page 2).

All issues presented here were duly presented to the Court of Appeals. (See Appendix A).

1. WHETHER INFORMATION OF CRIMINAL ACTIVITY OCCURRING MORE THAN TWENTY (20) MONTHS PRIOR TO THE ISSUANCE OF A SEARCH WARRANT IS TOO REMOTE IN TIME TO ESTABLISH PROBABLE CAUSE AT THE TIME OF THE ISSUANCE OF THE WARRANT.

In *Sgro v. United States*, 287, U.S. 206 (1932), this Court had occasion to deal with the question of time and its relation to probable cause. There the Court said that while there

is no fixed time within which proof of probable cause must be related to the issuance of a warrant,

> "It is manifest that the proof must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time."

In the instant case, the information in the affidavit relating to criminal activity was approximately twenty (20) months old when the affidavit was sworn to. While there was a more recent confession by a co-defendant, this confession did not add any recent information regarding the present whereabouts of the weapons. The only information in the affidavit which purported to relate to the present concerned an investigation of two pawn shops and Denver Police pawn shop records indicating that none of the weapons had been sold through these outlets.

This Court has never upheld the issuance of a search warrant based upon information so remote from the issuance date as is presented here, nor have any Court of Appeals' decisions upheld a search warrant based upon an affidavit which depended on information this remote. Other Federal decisions appear to be clearly in conflict with the appellate court's ruling in this case.

In *Durham v. United States*, 403 F2d 190 (9th Cir. 1968), the Court, in ruling that unlawful activities described in the Affidavit having occurred at least four (4) months and as much as ten (10) months prior to the issuance of the warrant were insufficient to provide a basis for probable cause, stated:

> "The most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy. There must be reasonable grounds for believing that the immediate

search for which authority is sought may be fruitful."

See also, *Schoeneman v. United States,* 317 F2d 173 (D.C. Cir. 1963):

> "The government could cite, and we could find no case which sustained a search warrant issued more than thirty (30) days after finding of the evidence which constituted the basis for the search."

Indeed, the Tenth Circuit's decision in *United States v. Neal,* 500 F2d 305 (10th Cir. 1974), appears to be directly contrary to the decision in the instant case.

While there is no yardstick for determining how remote in time information or conduct must be before it will fail to justify a determination of probable cause, the court below has so far departed from existing case law regarding the time element of probable cause that this issue should be decided by this Court.

Clearly, time is a crucial element of probable cause. While it is certainly not the only element to be considered in determining the existence of probable cause, the decision below is in conflict with the ruling of other Federal courts and this Court should therefore rule upon the issue. The element of time, as presented in the facts of this case, raises an important constitutional question which should be settled by guidelines from this Court.

Further, in affirming the decision below, the Court of Appeals gave unwarranted deference to the fact that the magistrate had found probable cause and had issued the search warrant. This deference is a substantial departure from existing law and is not required or permitted by the Fourth Amendment. This is an important issue which should be determined by this Court.

II. WHETHER THE STATEMENT AND WEAPONS TAKEN FROM PETITIONER SUBSEQUENT TO THE SEARCH OF HIS RESIDENCE CONSTITUTED THE FRUITS OF THE UNLAWFUL SEARCH OF HIS RESIDENCE.

The Petitioner raised this issue at the Court of Appeals. However, inasmuch as the Court affirmed the lower Court's decision regarding the legality of the search, this issue was not decided. The determination of this issue is essential to a complete ruling in this case if the search of Petitioner's residence is held to be illegal.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Publish

United States Court of Appeals

TENTH CIRCUIT

JANUARY, 1975, TERM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CALVIN D. RAHN,
Defendant-Appellant.

No. 74-1324

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D. C. No. 73-CR-299)

Robert A. Wagner (Marshall A. Fogel, on the brief), Denver, Colorado, for Defendant-Appellant.

J. Terry Wiggins, Assistant United States Attorney (James L. Treece, United States Attorney, on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before BREITENSTEIN, HILL and DOYLE, United States Circuit Judges.

HILL, Circuit Judge.

This is a direct appeal from a conviction for violations of 18 U.S.C. §§ 641 and 2.[1]

The issues presented in this appeal involve only the denial of suppression of evidence due to an allegedly unlawful search and seizure.

On July 10, 1973, Inspector Neal of the Alcohol, Tobacco & Firearms Bureau (ATF), Office of Inspection, submitted an Affidavit for Search Warrant to a United States Magistrate seeking a warrant to search appellant's residence. The affidavit resulted from an investigation by the ATF inspection service into alleged misuse of seized property by ATF agents. Appellant was an ATF special investigator stationed in Denver.

Based upon the affidavit, the magistrate issued the requested search warrant on July 10. The warrant was executed on July 13; searchers discovered and seized six weapons and a written list of firearms from appellant's home. Appellant and his family were on vacation during this time period. On July 13 the ATF regional director, Billy Gaunt,

---

1

18 U.S.C. § 641 provides:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted —

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

18 U.S.C. § 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

telephoned appellant and ordered him to return to Denver to meet with the inspection service.

The next day appellant flew into Stapleton International Airport and was met by Jim Duff, appellant's immediate supervisor and friend. Appellant had with him seven firearms which had been certified as destroyed. Appellant was taken to the ATF office in Denver; he made a lengthy incriminating statement and turned over the seven weapons to the ATF investigators.

Appellant and his former supervisor, Karl Terlau, were indicted for one count of violating 18 U.S.C. §§ 1001 and 2, and one count of violating 18 U.S.C. §§ 641 and 2. Terlau pled guilty to one count and testified at appellant's trial. The weapons and list seized in the residence search, the seven firearms appellant brought back to Denver, and appellant's July 14 statement were admitted as evidence. The jury found appellant guilty as to the second count, conversion of government property to his own use.

Appellant raises three issues. (1) The affidavit was based on observations of alleged unlawful activity made more than a year and a half before the application for a search warrant; consequently, the information in the affidavit was not recent enough to establish probable cause for the search warrant to issue. The residence search was unlawful and the evidence seized should have been suppressed. (2) The affidavit failed to give the magistrate probable cause to believe the weapons were, in fact, located in appellant's residence. (3) The evidence obtained from appellant on July 14, 1973, was the direct result and product of the unlawful residence search.

We are guided by several general principles in our review of this affidavit. Affidavits for search warrants are to be tested and interpreted in a common sense and realistic manner. United States v. Ventresca, 380 U.S. 102 (1965). *Reviewing courts should give deference to determinations of*

probable cause by issuing magistrates. United States v. Neal, 500 F2d 305 (10th Cir. 1974); United States v. DePugh, 452 F2d 915 (10th Cir. 1971), *cert. den'd,* 407 U.S. 920 (1972); United States v. Berry, 423 F2d 142 (10th Cir. 1970).

> It is generally recognized that probable cause is one of probabilities and a valid warrant may issue when the circumstances before a proper officer are such that a person of reasonable prudence would believe that a crime was being committed on the premises to be searched or evidence of a crime was being concealed there. United States v. Neal, *supra.*

Probable cause is not determined by hindsight but as of the time the affidavits were presented to the magistrate. Schoeneman v. United States, 317 F2d 173 (D.C. Cir. 1963). *Doubtful cases should be largely resolved by the preference to be given warrants.* United States v. Ventresca, *supra.*

Appellant's first attack on the affidavit's sufficiency deals with the timeliness of the information. Time is a crucial element of probable cause. United States v. Holliday, 474 F.2d 320 (10th Cir. 1973); United States v. Johnson, 461 F.2d 285 (10th Cir. 1972). The Supreme Court has discussed this element of probable cause:

> " . . . the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206 (1932).

In *Neal,* this Court stated that "[p]robable cause existing at some time in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continued to the time the affidavit was filed." However, probable cause is not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance. United States v. Johnson, *supra.*

The search warrant here was issued on July 10, 1973, the affidavit detailed several occurrences involving the property sought. Terlau, in an interview the day before the warrant issued, stated that in 1971 he and appellant each had agreed to take several of the weapons. Terlau also said that appellant had commented when they took the weapons that *several of the weapons were too nice to destroy and would be worth more money if kept for several years.* The affidavit recounted Special Agent Carl Newton's statement in which he remembered seeing appellant in the fall of 1971 using a Browning over/under 12 gauge shotgun identical to one Newton had seen in the ATF vault. *That weapon was one subject to the destruction order according to the affidavit.* The affidavit indicated Terlau had sold his weapons to Lakewood Pawnbrokers: *the affiant had investigated two pawnbrokers in Lakewood and had checked the Denver Police pawn shop records. This search had not revealed any sales of weapons by appellant.*

The affidavit clearly would give a magistrate probable cause to believe appellant had taken some of the weapons. Because of the unique facts of this case, we believe the affidavit also gave the magistrate probable cause to believe appellant still possessed the weapons in spite of the lapse of time between the facts relied on and the warrant's issuance. *Newton's account indicates appellant had appropriated at least one of the weapons for his personal use. This appropriation combined with the comment Terlau remembered that appellant believed the weapons would appreciate in value would give more than a suspicion appellant still possessed the weapons.* The investigation, although far from extensive, disclosed appellant apparently had not disposed of the weapons in the manner Terlau had utilized. Furthermore, the magistrate, employing the common sense interpretation of affidavits approach, may have recognized appellant's awareness, as an ATF agent, that in selling the guns he would be

taking a real risk of detection. Consequently, we believe the affidavit provided circumstances from which it could be inferred that the probable cause clearly existing in the past continued to the time the affidavit was filed. The affidavit information was recent enough to establish probable cause in this case.

Appellant also attacks the sufficiency of the affidavit by contending it did not show probable cause to believe the articles listed in it would be found in the residence. Both parties cite United States v. Lucarz, 430 F.2d 1051 (9th Cir. 1970), where the Ninth Circuit upheld the search of a residence and said:

> "The situation here does not differ markedly from other cases wherein this court and others, albeit usually without discussion, have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation . . . but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property."

Lucarz and the other cases cited by appellant and the government state the general rules in this area, those cases, however, are persuasive only to the degree they present facts similar to those now before the court. The issue for our determination is whether the facts and circumstances described in the affidavit would warrant a man of reasonable caution to believe that the articles sought were located at appellant's residence. Lucarz v. United States, *supra.* The affidavit need not contain information providing " . . . certainty that the objects sought will be found as a result of the search." Porter v. United States, 335 F.2d 602 (9th Cir. 1964), *cert. den'd,* 379 U.S. 983 (1965).

As appellant points out, the affidavit does not contain anyone's observation of the property at the residence; that missing information, however, is not fatal to a determination that probable cause existed to search the residence. *See* United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973), *cert. den'd*, ___ U.S. ___ (1974); United States v. Lucarz, *supra*. The affidavit, as we have determined, gave probable cause to believe appellant still possessed the weapons. The affidavit contained the report indicating appellant had used one of the weapons for hunting purposes. The statement concerning the guns' appreciation potential indicates appellant would have given some care to their storage. As Chief Judge Arraj stated, in denying the original motion to suppress: "It is reasonable to assume that his house was where he kept things and it is pretty normal I believe for individuals to keep weapons in their homes, particularly hunting weapons and weapons which may be kept for the safety of the family." Here an ATF agent was believed to possess the weapons; certainly, he would not have had the weapons at his office. Admittedly there are other places where the guns *might* have been stored: yet, we believe these facts and circumstances gave the magistrate probable cause to believe the weapons would be found as a result of the search of appellant's present residence.

In making these decisions concerning the affidavit's sufficiency, we have given deference to the issuing magistrate's determination and have remembered that even doubtful cases are to be resolved largely by the preference to be given warrants. Having determined that the affidavit provided probable cause for the search warrant to issue, we hold the search was proper. Consequently, we do not reach appellant's third contention concerning "fruit of the poisonous tree".

AFFIRMED.

APPENDIX B

MARCH TERM — March 25, 1975

Before The Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CALVIN D. RAHN,
Defendant-Appellant.

No. 74-1324

This matter comes on for consideration of the petition for rehearing and suggestion for rehearinng en banc filed by the appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Breitenstein, Hill and Doyle to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

Supreme Court, U. S.
FILED
JUL 9 1975
MICHAEL RODAK, JR., CLERK

No. 74-1337

In the Supreme Court of the United States

OCTOBER TERM, 1975

CALVIN D. RAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1337

CALVIN D. RAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that certain evidence admitted at his trial either was discovered during a search conducted without probable cause or was the fruit of an unlawful search.

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of having converted to his personal use property belonging to the United States, in violation of 18 U.S.C. 641.[1] He was sentenced to a term of six months' imprisonment, to be followed by a term of three and one-half years' probation, and was fined $2,000. The court of appeals affirmed (Pet. App. A).

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[1]Petitioner was acquitted of having knowingly and willfully submitted a false document to a federal agency, in violation of 18 U.S.C. 1001 (Pet. App. A, pp. 13-14).

The evidence introduced in connection with petitioner's motion to suppress established that on July 10, 1973, Inspector Jackie Neal of the Alcohol, Tobacco & Firearms Bureau (ATF) in Denver, Colorado, submitted an affidavit to a United States magistrate in support of an application for a warrant to search petitioner's residence. Petitioner was at that time employed as an ATF special agent in Denver. The request for the search warrant resulted from and was part of an investigation by the ATF inspection service into the suspected conversion of government property by ATF agents (Pet. App. A, p. 13).

The magistrate issued the warrant on July 10, 1973, and it was executed on July 13. During the search of petitioner's home, six weapons belonging to the government, and also a written list of weapons, were found and seized. ATF Regional Director Billy Gaunt also telephoned petitioner, who was then vacationing in Minnesota, on July 13 and ordered him to return to Denver to meet with ATF investigators. Petitioner returned to Denver on July 14 and was met at the airport by Jim Duff, his immediate supervisor. In petitioner's possession at the time were seven firearms that he had previously certified as having been destroyed. Petitioner subsequently turned these firearms over to ATF investigators and made a lengthy incriminating statement (Pet. App. A, pp. 13-14).

1. Petitioner's basic contention (Pet. 8-10) is that the affidavit supporting the request for a warrant to search his residence relied upon facts too remote in time to establish probable cause for the search.

Inspector Neal stated in the affidavit that on July 9, 1973, petitioner's former supervisor, Karl Terlau, had admitted in an interview with ATF investigators that he and petitioner had agreed to disobey their orders to destroy some of the weapons that had been seized from

Robert Nelson in September 1969, and instead to keep several of the weapons. Terlau had stated further that he could not remember which weapons petitioner had taken, but that he remembered that petitioner had commented at the time that several of the weapons were "too nice to destroy, and would be worth much more money if kept for several years" (Pet. 5).

Inspector Neal also recounted in the affidavit that Terlau had confessed that he had sold to a pawnbroker the weapons that he had taken. Neal stated that he had checked with two pawnbrokers in Denver and had looked at the pawnshop records of the Denver Police Department but that he had not discovered any weapon sales by petitioner. Neal also stated that Special Agent Carl Newton had told him that in the fall of 1971 he had seen petitioner using a Browning over/under 12-gauge shotgun identical to one Newton had seen earlier in the ATF vault. Newton had observed petitioner remove the weapon from a tan suede case, which had appeared to Newton to be the same case that he had seen in the vault (Pet. 4-6).

In arguing that the representations made by Inspector Neal in his affidavit did not give ATF investigators probable cause to search his home, petitioner places primary emphasis upon the fact that the request for the warrant followed by approximately twenty months most of the events relied upon to justify the search. The only information relating to more recent events, according to petitioner, concerned the results of Inspector Neal's investigation of pawnshop transactions, which had revealed that petitioner probably had not pawned any of the weapons in Denver. But the existence of probable cause for a search "cannot be quantified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit." *United States* v. *Johnson*, 461 F.2d 285, 287 (C.A. 10). The lapse

of time between the occurrence of the facts relied upon and the request for the search warrant, while important, is only one of the factors to be considered in determining whether probable cause exists. *Ibid.*; see also *Irby* v. *United States*, 314 F.2d 251, 254 n.* (C.A. D.C.), certiorari denied, 374 U.S. 842. Furthermore, the existence of probable cause cannot be determined merely by matching the lapse of time in this case with the lapse of time in other cases. See *Hefferman* v. *United States*, 50 F.2d 554, 556 (C.A. 3). Rather, each case must be decided in light of the particular circumstances presented. See *United States* v. *Harris*, 482 F.2d 1115, 1119 (C.A. 3); *United States* v. *Johnson, supra*; *United States* v. *Guinn*, 454 F.2d 29, 36 (C.A. 5), certiorari denied, 407 U.S. 911; *Irby* v. *United States, supra*.

The information presented to the magistrate in the present case was sufficient to establish probable cause for the search of petitioner's residence. As the court of appeals noted (Pet. App. A, p. 16):

> Newton's account indicates [that petitioner] had appropriated at least one of the weapons for his personal use. This appropriation combined with the comment Terlau remembered that [petitioner] believed the weapons would appreciate in value would give more than a suspicion [that petitioner] still possessed the weapons. The investigation, although far from extensive, disclosed [that petitioner] apparently had not disposed of the weapons in the manner Terlau had utilized. [Emphasis omitted.]

Moreover, the affidavit contained sufficient information to justify the magistrate's conclusion that probable cause existed for the search of petitioner's residence, rather than of some other place. Again, as noted by the court of appeals (Pet. App. A, p. 18):

> The affidavit, as we have determined, gave probable cause to believe [that petitioner] still possessed the weapons. The affidavit contained the report indicating [that petitioner] had used one of the weapons for hunting purposes. The statement concerning the guns' appreciation potential indicates [that petitioner] would have given some care to their storage. As Chief Judge Arraj stated, in denying the original motion to suppress: "It is reasonable to assume that his house was where he kept things and it is pretty normal I believe for individuals to keep weapons in their homes, particularly hunting weapons and weapons which may be kept for the safety of the family." Here an ATF agent was believed to possess the weapons; certainly, he would not have had the weapons at his office. Admittedly there are other places where the guns *might* have been stored; yet, we believe these facts and circumstances gave the magistrate probable cause to believe the weapons would be found as a result of the search of [petitioner's] present residence. [Emphasis in original.]

2. Petitioner's further contention (Pet. 11) that his confession and the weapons that he turned over to ATF investigators upon returning from Minnesota to Denver should have been excluded from his trial because of their relationship to the unlawful search of his residence must, of course, be rejected if the search itself is held to have been lawful. But the confession and the weapons brought by petitioner from Minnesota would have been admissible in any event.

There is nothing in the record to suggest that petitioner's confession was coerced. It is undisputed that petitioner, a veteran law enforcement officer, was fully advised of his rights before he confessed to having converted some of the weapons he had been ordered to destroy (Pet. 7; II Tr. 12; IV Tr. 75). It is true that the search of petitioner's resi-

dence had occurred prior to his admitting that he had converted the weapons to his personal use, but he also knew at the time that his former supervisor, Karl Terlau, had admitted his own involvement in the conversion of the weapons and had disclosed the fact of petitioner's involvement. Petitioner's confession therefore had a basis independent of the evidence discovered during the search of his residence. See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392; *United States* v. *Cox*, 459 F.2d 986, 987-988 (C.A. 5).

There is similarly no evidence in the record to suggest that petitioner's decision to return the weapons that he brought with him from Minnesota was coerced or that it was related to the search of his residence.[2] *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975, slip op. at 9-13. Moreover, petitioner did not move to suppress these weapons and he is thus foreclosed from belatedly objecting to their admission into evidence even if their discovery did result from a prior unlawful search. *United States* v. *Ellis*, 461 F.2d 962, 968-969 (C.A. 2), certiorari denied, 409 U.S. 866.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]There was conflicting evidence concerning whether petitioner was informed by Billy Gaunt on July 13 that his residence had been or was about to be searched (I Tr. 168; II Tr. 111; III Tr. 33-35, 132-133; IV Tr. 25-26). Petitioner has never claimed, however, that Gaunt asked him to bring any weapons he had with him in Minnesota back to Denver or, indeed, that Gaunt had any reason to believe that petitioner had any of the stolen weapons with him in Minnesota.